Supreme Court of the United States

October Term, 1971

No. 71-1317

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,
Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
AND
UNITED STATES OF AMERICA,
AND
DAVID E. ALLGOOD, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION TO ADVANCE

TOY D. SAVAGE, JR.
ALLAN G. DONN
WILLCOX, SAVAGE, LAWRENCE,
DICKSON & SPINDLE
Virginia National Bank Building
Norfolk, Virginia 23510

LEONARD H. DAVIS
City Attorney
Norfolk, Virginia 23501

Attorneys for Petitioners

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MOTION TO ADVANCE

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It presents issues of national importance which require prompt resolution by this Court for the reasons stated in the annexed petition for a writ of certiorari. It would be desirable for the issues to be decided before the end of the current term of this Court in order to guide the Norfolk School Board as well as the many courts and school boards now making plans for the coming year and to avoid the unnecessary expenditure of the substantial sums of money required by the Court of Appeals for the acquisition of a school bus system, with

the attendant adverse effect on the educational services provided by the Norfolk School Board.

Wherefore, petitioners pray that the Court:

1. Advance consideration of the petition for a writ of certiorari and any response thereto during the current term or, if need be, during the Court's vacation or such special or extended term as may be convenient; and

2. If the Court determines to grant the petition for certiorari, arrange such procedures as will permit prompt decision on the merits as the Court may deem appropriate.

Respectfully submitted,

/s/ Toy D. Savage, Jr.
Allan G. Donn
Willcox, Savage, Lawrence,
Dickson & Spindle
Virginia National Bank Building
Norfolk, Virginia 23510

Leonard H. Davis
City Attorney
Norfolk, Virginia 23501

Attorneys for Petitioners

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The School Board of the City of Norfolk, Virginia, petitioner, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 7, 1972.

OPINIONS BELOW

Although this proceeding has been pending for more than fifteen years, resulting in a substantial number of opinions of the United States District Court for the Eastern

District of Virginia and the United States Court of Appeals for the Fourth Circuit, the opinions of the courts below directly preceding this petition are as follows:

1. The opinion of the Court of Appeals filed March 7, 1972, not yet reported (Appendix hereto p. 1).

2. Memorandum Opinion of the United States District Court for the Eastern District of Virginia, filed July 28, 1971, not yet reported (App. 24).

JURISDICTION

The judgments of the Court of Appeals were entered on March 7, 1972 (App. 21 and 23). An order was issued by the Court of Appeals on April 3, 1972, staying the mandates until April 18, 1972, in order to permit the defendants to apply for a writ of certiorari or a stay (App. 24). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution requires that a school system which has successfully implemented a court approved unitary student assignment plan and which has not historically provided free pupil transportation must now provide free transportation for every student?

2. Whether the court below, which affirmed the trial court finding that there had been "a good faith effort at desegregation on the part of responsible school officials and local government," was empowered to overrule the exercise of discretion by the District Judge and require the School Board to pay counsel fees of plaintiffs?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. Introduction

The petitioners are seeking a review of an *en banc* decision of the United States Court of Appeals for the Fourth Circuit, reversing and remanding, in part, an Order of John A. MacKenzie, Judge of the Eastern District of Virginia, which had held in pertinent part that the Norfolk School Board was not required to provide free transportation for all students and that the plaintiffs were not entitled to an award of counsel fees.

2. Proceedings Below

The District Court on July 15 and 27, 1971, conducted hearings on the plan of the Norfolk City School Board for the operation of its schools for the 1971-72 school year. A memorandum opinion was filed on July 28, 1971.

The District Court held that the student assignment plan satisfied the requirements of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The only question related to student assignment which was before the Court of Appeals was the senior option provision, the validity of which was affirmed by the appellate court. There were some additional objections by plaintiffs to other aspects of the plan; but they were dismissed by the trial court and the appellate court as inconsequential and those points are not pertinent to the present petition.

The holdings of the courts below which are pertinent to this petition are the following:

(a) The District Court held that the Norfolk School Board had no constitutional duty to provide free transportation for every student who lives beyond walking distance from the school to which he is assigned. The Court of Appeals reversed the District Court and held that the School Board was required to provide free transportation.

(b) With respect to plaintiffs' request for counsel fees, the District Court held that there had been "a good faith effort at desegregation on the part of responsible school officials and local government" and that, under the existing case law of the Fourth Circuit, plaintiffs were not entitled to counsel fees. The Court of Appeals stated that it would not disturb the finding of good faith and that plaintiffs were not entitled to counsel fees under its prior decisions. However, the Court of Appeals proceeded to award partial counsel fees on the basis described by it as "a quasi-application of the 'common fund' doctrine." The District Court had not considered the "common fund" doctrine. It was never suggested, briefed or argued by counsel for any party before the courts below.

3. Facts

The Norfolk School System consists of 51,000 students in 70 schools, and the City of Norfolk, 61 square miles in area, has a population of approximately 300,000. Neither the School Board nor the City of Norfolk has ever operated a bus system for the transportation of students to school. The only bus transportation available for the general public was that provided by the Virginia Transit Company, a private corporation, under permit from the City. Histori-

cally, students in the Norfolk system have paid for their own bus transportation. For example, in the 1970 school year, 8,000 students used public transportation at their own expense. The implementation of student assignment plans has greatly increased the number of students requiring transportation.

The two alternative methods under contemplation for providing free transportation have been (a) the payment of students' cost for use of the Virginia Transit Company system or (b) the acquisition and operation of a separate student bus system. Shortly before the decision of the Court of Appeals on March 7, 1972, the Virginia Transit Company served notice on the City of Norfolk that it would terminate service for all passengers as of August 23, 1972. The arrangements for public transportation in Norfolk beginning in September, 1972, are indeterminate now, and a decision as to the method of pupil transportation is an essential element to provision of general public urban mass transit. With respect to the second alternative, the District Court found that the initial cost of acquisition and operation for one year was more than $3,600,000.00. The Court of Appeals held that that amount was not unreasonably burdensome even though its requirement "imposes a substantial expense upon the District which may force it to curtail some other worthwhile services. . . ." The Court of Appeals thus recognized that there would be a reallocation of resources among expenses of education rather than the creation of even a *quasi* "common fund."

REASONS FOR GRANTING THE WRIT

1. Free Pupil Transportation

A. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING JUDICIAL INTERVEN-

TION IN THE EXERCISE OF FISCAL POWERS BY LEGISLATIVE BODIES WHICH WILL HAVE SERIOUS CONSEQUENCES FOR BOTH PUPIL AND PUBLIC TRANSPORTATION IN METROPOLITAN AREAS.

The decision below involves an important federal question which has not been, but should be, settled by this Court, namely the power of the federal courts to order a local government which has not previously operated a bus system to levy and collect taxes for the purpose of providing free transportation to all school students. The question presented affects the taxpayers and school boards of every school system in the country in which free transportation for every student is not now provided. In metropolitan areas, it will have an enormous impact upon general public mass transit and automobile traffic problems.

It should be noted that the Court of Appeals drew no distinction between those students who were assigned to the school closest to their home and those assigned to more distant schools, or between those students as to whom it could fairly be said that the bus fare was an unreasonable burden and those students who were not indigent in that respect. Furthermore, there was no evidence in the record, nor any finding that the desegregation plan was not working or that any child was unable to attend school because of the bus fare. During the current school year, every school in the system is racially integrated.

In effect, the court below has ruled that, if a school board is in the process of implementing a desegregation plan even though the implementation has successfully resulted in a unitary school system, then the school board may not provide free transportation for less than every student in the system. The court recognized that its ruling could require the Norfolk School Board to divert funds from other

worthwhile educational programs. The overly broad principle announced by the court below constitutes the exercise of the budgetary powers customarily reserved to local government and legislative bodies and imposes on the School Board the view of the Court of Appeals as to what constitutes wise economic and social policy. *Dandridge* v. *Williams*, 397 U.S. 486 (1969).

This Court has been unwilling to sanction judicial intervention in the exercise of fiscal powers by legislative bodies, except under unusual circumstances not present here. The first area of exceptions to the general rule consists of cases of default on municipal bonds where the legislative body had at the outset agreed to make the expenditures required and where the remedy involved the payment of a sum certain and not the selection among a number of alternative policy decisions. In other words, the legislative body had exercised its discretion at the time of issuance of the bonds, and all that remained was the ministerial act of satisfying the obligation undertaken by the legislative body. e.g., *Graham* v. *Folsom*, 200 U.S. 248 (1906). A second area of exception to the general rule is illustrated by *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). In that case, this Court held that it was a denial of equal protection under the law for Prince Edward County to close its previously existing schools where the only reason for such closing was the constitutionally impermissible purpose of opposing a desegregation plan. Neither of the exceptions to the general rule is applicable in the present case, for neither the Norfolk School Board nor the City Council nor any other governmental authority has ever operated a bus system.

The question presented here was not decided in *Swann* because the Charlotte-Mecklenburg school system had an

existing student transportation system. *Northcross* v. *Board of Education of Memphis City Schools,* 444 F.2d 1179, 1182 (6th Cir. 1971). This Court has not held that every school system subject to a desegregation order must provide free transportation for every student.

The facts of this case establish that the failure to provide free transportation for all school students is neither an arbitrary nor an unreasonable exercise of legislative discretion. It should be observed that there are many variations in the provision of free goods and services among the school jurisdictions of Virginia, as well as throughout the rest of the country. For example, while Norfolk furnishes free textbooks to most students, Virginia Beach sells textbooks and Chesapeake rents books. Some school systems have kindergarten, while others do not. The Norfolk School Board has exercised its informed judgment to conclude that, in the allocation of scarce financial resources, the provision of free transportation for every student has a lower priority than a number of other educational programs. It is not a question of opposition of the School Board to providing free transportation as a general principle, but the question of fund allocation. The School Board has applied and will continue to apply for and use whatever federal and state funds may become available, whether in the form of grants to the Board specifically for transportation or in such other forms as the inclusion of school transportation allowances in welfare payments to individual families.

B. THERE IS A CONFLICT BETWEEN CIRCUITS CONCERNING PROVISION OF FREE TRANSPORTATION.

The absence of a ruling by this Court on the question presented has resulted in confusion and inconsistent de-

cisions by the lower federal courts. The Court of Appeals for the Eighth Circuit has held that a district court erred in requiring a school district to furnish transportation to every student assigned to a school more than two miles from their homes. *Clark* v. *Board of Education of Little Rock School Dist.*, 449 F.2d 493, 499 (8th Cir. 1971), *cert. den.*, U.S. .... (.....). The Court stated that the school board was not required to provide transportation to those students who continued to attend the secondary school closest to their home. In the present case, the court below rejected the distinction accepted by the Eighth Circuit. There are numerous other school districts, such as Atlanta, Ga., Memphis, Tenn., Louisville, Ky., and Montgomery, Ala., varying in size from the large to the small, which have handled pupil transportation in the same way as Norfolk. In view of the decision below in the Norfolk case, it can be anticipated that the issue of free pupil transportation in such school systems will be frequently recurring. A clear definition of the law is urgently needed before irreversible action is initiated in such cities.

2. Allowance Of Counsel Fees Of Plaintiffs

A. The New Exception Fashioned By The Court Of Appeals To The Established General Rule Prohibiting The Allowance Of Counsel Fees In The Absence Of Statute Has Broad Application And Will Unduly Burden Judicial Administration.

The Court of Appeals, by its *sua sponte* adaptation of a "common fund" doctrine, has enunciated an entirely new rule for the allowance of counsel fees in school desegregation cases. In so doing, it has decided a significant issue of social philosophy which has been much debated. Such debate

has centered around the comparison of the hazards to the administration of justice in the encouragement of frivilous litigation with the equity of sharing the cost of litigation among those receiving its benefits.

The decision as to free transportation serves only to reallocate School Board resources. As there is no "common fund" created, the School Board is directed to pay counsel fees. The effect is that those who lose benefits by the reallocation of funds as well as those who gain free transportation will contribute to any fee payment. If such tenuous finding of the existence of a "common fund" is to be a precedent, the "quasi-application of the 'common fund' doctrine" would be available in all school desegregation cases in which provision of educational services was modified. A further judicial extension of such doctrine to other areas of civil rights litigation would seem natural. The well established general judicial rule has been that attorneys' fees are not ordinarily recoverable in the absence of a statute, with certain limited historic exceptions. The Congress has taken this question of social philosophy to be within its legislative domain and has provided for the allowance of counsel fees in such areas as Equal Employment Opportunities (42 U.S.C. 2000e-5(k)) and Public Accommodations (42 U.S.C. 2000a-3(b)). To date, the Congress has not made any such provision applicable to school desegregation cases. On April 23, 1971, the Senate adopted an amendment to S. 1557, known as the Emergency School Aid Bill, providing for the discretionary allowance by the court of counsel fees in school desegregation cases. 117 Cong. Rec. S5538 (daily ed. Apr. 23, 1971). The House of Representatives has not acted upon S. 1557 and, on November 1, 1971, declined to suspend the rules to take up H.R. 2266 which contained a similar fee allowance provision. 117 Cong. Rec. H 10156-57 (daily ed. Nov. 1, 1971).

With legislation on this subject in this posture in Congress, certainly it is inappropriate for the courts to fashion a broadly applicable new exception to such a well established general rule of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinion of the Fourth Circuit.

Respectfully submitted,

TOY D. SAVAGE, JR.
ALLAN G. DONN
WILLCOX, SAVAGE, LAWRENCE,
DICKSON & SPINDLE
Virginia National Bank Building
Norfolk, Virginia 23510

LEONARD H. DAVIS
City Attorney
Norfolk, Virginia 23501

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Toy D. Savage, Jr., hereby certify that, on the 13th day of April, 1972, a copy of the foregoing Petition for a Writ of Certiorari and Motion to Advance and Motion to Dispense with Printing was mailed to the following at their respective addresses, first class mail, postage prepaid, in accordance with Rule 33. I further certify that all parties required to be served have been served.

S. W. Tucker, Esquire
Henry L. Marsh, III, Esquire
James W. Benton, Jr., Esquire
Hill, Tucker and Marsh
214 East Clay Street
Richmond, Virginia 23219

Jack Greenberg, Esquire
James M. Nabrit, III, Esquire
Norman Chachkin, Esquire
10 Columbus Circle
Suite 2030
New York, New York 10019

Victor J. Ashe, Esquire
Plaza One
Norfolk, Virginia 23510

Solicitor General
Department of Justice
Washington, D.C. 20530

M. T. Bohannon, Jr., Esquire
Herbert and Bohannon
Suite 402, Plaza One
Norfolk, Virginia 23510

TOY D. SAVAGE, JR.

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided March 7, 1972

Nos. 71-1900 and 71-1901

* * *

Russell, Circuit Judge:

As a result of the decision of the Supreme Court in *Swann*[1] and *Davis*,[2] this Court vacated the judgments of the District Court in this and four other school desegregation cases and remanded the proceedings to the District Courts having jurisdiction over such cases, with instructions "to receive from the respective school boards new plans (of desegregation) which will (would) give effect to *Swann* and *Davis*," employing in the development of such plans "the use of all techniques for desegregation, including pairing or grouping of schools, noncontiguous attendance zones, restructuring of grade levels, and the transportation of pupils." *Adams* v. *School District Number 5, Orangeburg Co., S. C.* (4th Cir. 1971) 444 F.2d 99, 100, 101.

Upon remand, the school board in this case filed a revised plan of desegregation. Under the restructuring of the schools within the district proposed in such plan, including the pairing and clustering of a number of its schools, large numbers of students were to be assigned to schools beyond normal walking distance from their homes. Objections were entered to this plan by the plaintiffs-appellants, as well as by certain intervenors-cross-appellants; and several hearings were had. After certain changes and modifications had been

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[1] *Swann* v. *Board of Education* (1971) 402 U.S. 1 and 43, 91 S. Ct. 1267 and 1284, 28 L. Ed. (2d) 554 and 586.

[2] *Davis* v. *School Comm'rs. of Mobile County* (1971) 402 U.S. 33, 91 S. Ct. 1289, 28 L. Ed. 2d 577.

made, the District Court approved the plan of desegregation and from this approval the plaintiffs and intervenors have appealed.

The intervenors object that the plan seeks, contrary, as they assert, to the mandate of *Swann*, to balance racially the schools of the defendant district. It is permissible under *Swann* to use racial percentages as a "starting point" for a plan of desegregation. Of course, as *Swann* makes clear (402 U.S. 23-5), these percentages, at best, will be regarded as mere approximations, for, as the Court in *Norwalk Core* v. *Norwalk Board of Education* (2d Cir. 1970) 423 F.2d 121, at p. 122, said:

> "The racial ingredients of schools cannot be prescribed with such certainty of a correct optimum result as might be found in a gourmet cook book specifying the proper portions for a de luxe casserole."

And this is all we construe the plan in this case to do. The intervenors, also, assert that the plan is unacceptable to a large segment of the patrons of the school system and is therefore unworkable. Such objection has been repeatedly disallowed.[3] The last claim raised by the intervenors is that, as a result of the plan, pupils are being subjected to unreasonable risks to their health and safety by the assignments without their neighborhood. This contention, too, is without merit. Even in the illustrations set forth by the intervenors in their brief, bus trips required of pupils under the plan generally fall within a range of thirty minutes each way. This is much less than the three-hour round trip condemned in *Winston-Salem/Forsyth Bd. of Ed.* v. *Scott*, 404 U.S. 1221, 1227, n. 1 (Chief Justice Burger) and found unrea-

[3] See *Watson* v. *Memphis* (1963) 373 U.S. 526, 536-7, 83 S. Ct. 1314, 10 L. Ed. 2d 529.

sonable in *Mims* v. *Duval County School Board* (D.C. Fla. 1971) 329 F. Supp. 123, 133. Nor is it substantially different from the extent of busing required in *Swann* (402 U.S. at p. 30).

A number of the plaintiffs' objections to the plan, as raised in this appeal, are similarly inconsequential and may be dismissed. The allowance of the "rising seniors option," which the plaintiffs argue increased the black proportion in Booker T. Washington High School, and which permits rising seniors, if they so desire, to complete their final year at the school they attended the previous years, will only be effective during the current school year. Its effect on the racial composition of Booker T. Washington High School during 1971-72 has not been substantial. Taking into consideration the considerable changes already made in the assignment of pupils in this school system, we would not be disposed to interfere with this "senior option" plan in the midst of the current school year. Cf., *The Supreme Court, 1970, Term,* 85 Har. L. Rev. 3, 79, note 30. The school system is, also, moving expeditiously towards a proper racial balance in its teaching and administrative staffs. The plaintiffs do not seriously contend otherwise. Under these circumstances, we are inclined to agree with the conclusion of the District Court that judicial action in this connection does not appear presently required. Finally, the school district customarily files regularly with the Court reports of its progress in desegregation. The District Court found the reports as filed adequate and the plaintiffs have pointed to no specific areas in which these reports do not provide sufficient information to the Court. We shall not disturb the finding of the District Court in this regard.

The primary attack of the plaintiffs on the plan is directed at the failure to provide free bus transportation for those

pupils of the District who live beyond normal walking distance from the school to which they are assigned. As previously observed, the plan contemplates the assignment of a substantial number of pupils to schools located beyond walking distance of their homes but provides no means of transportation for pupils so assigned. The plaintiffs assert that, under these circumstances, the maintenance by the School District of a busing program for pupils who are not within walking distance of their assigned school is a necessary corollary to the assignment itself. They echo the comment of another Court, faced with a similar problem, that, it is "ridiculous to assign students to schools which they cannot reach." *Davis* v. *Board of Education of North Little Rock, Ark.* (D.C. Ark. 1971) 328 F. Supp. 1197, 1203. While conceding that the School District has not heretofore operated a bus system or provided free busing,[4] they would find no more merit in the argument that this justifies failure to provide transportation than in the argument in the earlier stages of this proceeding against a duty to assign pupils outside their neighborhood for purposes of eliminating the vestiges of desegregation. They say the two requirements—to assign and to provide transportation—go hand-in-hand—and one without the other is useless. They dismiss as unacceptable the suggestion that the pupils should avail themselves at their own expense of the facilities of the local private bus transportation system to reach their assigned school. They point out that, under the present rates, these pupils would be required to pay $45 per school year for transportation and, under a set of proposed rates which

[4] The same situation prevailed in the school district whose plan of desegregation was reviewed in *Davis* v. *Board of Education of North Little Rock, Ark., supra.* Cf., however, *Norwalk Core* v. *Norwalk Board of Education* (D.C. Conn. 1969) 298 F. Supp. 213, at p. 224, aff. 423 F. 2d 121.

will soon become effective, $63 per year. A substantial number of the students reassigned come from families for whom these expenditures could be an unreasonable, if not an intolerable, burden. It was largely to safeguard the constitutional rights of this group of students that the plan of desegregation was promulgated. The plaintiffs urge that if the Court, after providing for their reassignment, takes no steps to make available to them, without cost, busing to the schools to which they are assigned, the whole plan of desegregation becomes a futile gesture and will represent for the disadvantaged child, intended to be protected thereby in his constitutional rights, a cruel hoax. This argument persuades; it also accords with our understanding of *Swann* and *Davis*, both of which recognized and enforced "the district court's equity power to require transportation whenever and wherever necessary to disestablish a dual school system."[5]

It is regrettable that the requirement that the School District furnish busing for these students assigned beyond walking distance from their homes imposes substantial expense[6] upon the District which may force it to curtail some

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[5] *United States* v. *Watson Chapel School District No. 24* (8th Cir. 1971) 446 F.2d 933, 937.

[6] This is not to indicate that the expense of busing may never be so unreasonably burdensome as to warrant denial of the relief. What we conclude is that the cost of busing in this case is not so unreasonably burdensome. This we think is evident both from the findings of the District Court and from the record. The District Court found the cost of installing and operating a transportation system by the school district to be $3,600,000. Of this sum, however, approximately $3,000,000 represented capital outlays, covering purchases of buses and the acquisition and equipping of service yards. These expenditures are normally funded and are not considered an operating expense. The annual operating expense of the bus system for the school district was fixed at about $600,000, of which 47 per cent would be reimbursable by the State. It would seem reasonable to assume that an annual operating budget of $600,000 by the district (supplemented as it would

other worthwhile services, but, if reassignment is mandated constitutionally, it must be effective and meaningful and "more than a matter of words."[7] To repeat, the Court cannot compel the student to attend a distant school and then fail to provide him with the means to reach that school.

The school district has indicated that if the District is required to operate a bus system for the transportation of its pupils, the loss of revenue thereby occasioned to the local private transportation system will render such system unprofitable and lead to its discontinuance, with resulting inconvenience to the entire community. The local transportation system, on the other hand, cannot be, as it were, subsidized at the inconvenience of, and in denial of the constitutional rights of, the students. It is possible, however, as we have already indicated, that the school district may find it both practical and economical to utilize the services of the

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be with State aid) would cover the operating costs of the system and provide adequately for normal amortization of the capital expenditures required for the purchase of buses and for the acquisition of service facilities. Such an expenditure from a school budget of over 35 million dollars would be in line with what was considered reasonable in *Swann*, where an increased annual operating expense of $1,000,000, imposed on a total school budget of $66,000,000, was held reasonable. See 85 Har. L. Rev. 83, note 61. Of course, it might be less expensive for the district to make an arrangement with the local bus system. Legislation is now being proposed in the Virginia Legislature to provide State financial support for private bus firms that carry children to school. *Richmond Times-Dispatch*, Section B, p. 1, February 9, 1972. The use of the private bus system in this situation may be both a practical solution for the school's problem and a means of financial relief for the private bus system itself. The relative merits of the two possibilities, i.e., the operation of its own bus system or the utilization of the services of the existing private bus service—are, however, for the initial consideration of the trustees of the school district and the District Court.

[7] See *Bradley* v. *School Board of City of Richmond, Virginia* (4th Cir. 1965) 345 F.2d 310, 323 (concurring and dissenting opinions of Judges Sobeloff and Bell), remanded, 382 U.S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187.

local bus system in discharging its obligation to provide adequate transportation for pupils assigned to schools beyond walking distance from their homes.[8] Whether this is a practical solution is a matter that may be considered by the District Court on remand. What is determined here is that the school district as a part of its plan of desegregation, must provide a practical method of affording *free* busing for students assigned to schools beyond normal walking distance of their homes; the mechanics of the method to be employed by the school district in discharge of this duty are for the District Court.

Finally, the plaintiffs ask that an allowance of attorney's fees be provided as a part of their taxable costs herein. In support, they cite *Bradley* v. *School Board of Richmond, supra* (345 F.2d p. 321). The federal rule, oft repeated, is that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Corp* v. *Maier Brewing* (1967) 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475; *Leary* v. *United States* (4th Cir. 1919) 257 Fed. 246, 250, aff. 253 U.S. 94, 40 S. Ct. 446, 64 L. Ed. 798; *McCraw* v. *United Ass'n of Journey. & App. of Plumbing, etc.* (D.C. Tenn. 1963) 216 F. Supp. 655, 664, aff. 341 F.2d 705.[9] To this rule, courts

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[8] Actually, the requirement that the school district provide free transportation, if complied with through some arrangement with the local bus sysem, may be the only means of preserving such system. See *Richmond Times-Dispatch*, Section B, p. 1, February 9, 1971, cited in note 6.

[9] In *Fleischmann* the Court observed that one of the reasons for the denial is that "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose subsantial burdens for judicial administration." 386 U.S. 718. See, also, *Lee National Corp.* v. *Kansas City Southern Industries, Inc.* (D.C. N.Y. 1970) 50 FRD 412, 414, for a statement of other reasons; and *Monolith Portland Midwest Co.* v. *Kaiser Aluminum & C. Corp.* (9th Cir. 1969) 407 F.2d 288, 293-4.

of equity, as *Fleischmann* adds, have established certain limited historic exceptions. These exceptions are confined to those unique and special cases involving "compelling circumstances"[10] and " 'overriding considerations of justice,' "[11] where to deny allowance would result in "gross injustice."[12] The most frequent exception occurs where "a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself"[13] and is usually "one where through the complainant's efforts a fund is recovered in which others share."[14] The rationale for this exception is that it is only fair that he who creates or conserves a common fund or property should be reimbursed for his reasonable expenses, including attorney's fees, for protecting the common fund for others having a similar interest with him in that fund. *Gibbs* v. *Blackwelder* (4th Cir. 1965) 346 F.2d 943, 945; *United States* v. *Jacobs* (D.C. Md. 1960) 187 F. Supp. 630, 634, aff. 298 F.2d 469.[15] The doctrine extends not only to

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[10] *Bradley* v. *School Board of Richmond, supra* (345 F.2d p. 321).

[11] *Fleischmann Corp.* v. *Maier Brewing, supra*, p. 718; *Siegel* v. *William E. Bookhultz & Sons, Inc.* (D.C. Ct. 1969) 419 F.2d 720, 722-3.

[12] *Monolith Portland Midwest Co.* v. *Kaiser Aluminum & C. Corp., supra*, at p. 294; see, also, *Rolax* v. *Atlantic Coast Line R. Co.* (4th Cir. 1951) 186 F.2d 473, 481.

[13] *Mills* v. *Electric Auto-Lite* (1970) 396 U.S. 375, 392, 90 S. Ct. 616, 24 L. Ed. 2d 593.

[14] *Sprague* v. *Ticonic Bank* (1939) 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184.

[15] 3 Barron & Holtzoff, *Federal Practice & Procedure* (Rev. Ed. 1958) p. 67, states the rationale thus:

> "The allowance of extraordinary costs 'as between solicitor and client' rests upon recognized equitable principles and may be made whenever the burden of litigation assumed by the prevailing party substantially benefits others who should in equity contribute to the expense."

cases in which a fund is either created or protected but also "where the effect of the suit is the same as though a fund were created." 6 Moore's *Federal Practice*, p. 1351; *Sprague* v. *Ticonic Bank, supra* (307 U.S. pp. 165-7). The purpose of the award in such case, however, is not designed "as an additional recovery against the wrongdoers, but as a means of ordering compensation to counsel from the class benefited." *Bangor & A. R. Co.* v. *Brotherhood of Loc. Fire & Eng.* (D.C. Ct. 1971) 442 F.2d 812, 823. The other normal exception to the general rule is illustrated by those "exceptional cases" "where the behavior of a litigant has reflected a wilful and persistent 'defiance of the law,' "[16] or where "an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.[17] This exception is inapplicable, however, "where litigation was pursued on a matter as to which prior decisions left a lingering doubt."[18] Whether the conduct of the party in maintaining his action or defense was in bad faith without any basis in law or fact and represented "obdurate obstinacy" is ordinarily a matter committed to the discretion of the District Judge, to be disturbed only "in the face of compelling circumstances." *Bradley* v. *School Board of City of Richmond, Virginia, supra* (345 F.2d p. 321);

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[16] *Kahan* v. *Rosenstiel* (3d Cir. 1970) 424 F.2d 161, 167, cert. den. 398 U.S. 950.

[17] 6 Moore's *Federal Practice, supra*, p. 1352; *Newman* v. *Piggie Park Enterprises* (1968) 390 U.S. 400, 402, note 4, 88 S. Ct. 964, 19 L. Ed. 2d 1263; *Undersea Eng. & Const. Co.* v. *International Tel. & Tel. Corp.* (9th Cir. 1970) 429 F.2d 543, 545; *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.* (5th Cir. 1971) 441 F.2d 631, 636-7; Note, 8 L. Ed. 2d 912.

[18] *Bangor & A. R. Co.* v. *Brotherhood of Loc. Fire. & Eng., supra*, at p. 824; *Local No. 149 I. U., U.A., A. & A.I.W.* v. *American Brake Shoe Co.* (4th Cir. 1962) 298 F.2d 212, 216, cert. den. 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276.

Williams v. *Kimbrough* (5th Cir. 1969) 415 F.2d 874, 875; cert. den. 396 U.S. 1061; *Cappel* v. *Adams* (5th Cir. 1970) 434 F.2d 1278, 1279-80; *Simler* v. *Conner* (10th Cir. 1965) 352 F.2d 138, 140-1, cert. den. 383 U.S. 928; *Lucerne Investment Company* v. *Estate Belvedere, Inc.* (3d Cir. 1969) 411 F.2d 1205, 1207.

This Court was the first Circuit to approve the grant of attorney's fees in school desegregation cases. *Bell* v. *School Board of Powhatan County, Virginia* (4th Cir. 1963) 321 F.2d 494, 500,[19] and *Bradley* v. *School Board of City of Richmond, Virginia, supra.* In so doing, we laid down the rule that such award was warranted under the exception that permitted such allowance where an unfounded action is brought or maintained in bad faith; specifically, we held that the right was limited to "the extraordinary case" and was "appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy,"[20] or persistent defiance of law.[21] This doctrine, thus enunciated by this Court, has been uniformly followed in the other Circuits where an award has been considered; and allowances have been made only where there has been a finding of "unreasonable, obdurate obstinacy" or persistent "defiance of law." Accordingly, in *Felder* v. *Harnett County Board of Education* (4th Cir. 1969) 409 F.2d 1070, 1075; *Kemp* v. *Beasley* (8th Cir. 1965) 352 F.2d 14, 23; *Williams* v. *Kimbrough* (D.C. La. 1969) 295 F. Supp. 578, 587, aff. 415 F.2d 874, cert. den. 396 U.S. 1061; *Rogers* v. *Paul* (D.C. Ark. 1964) 232 F. Supp. 833, 843, aff. 345 F.2d 117, remanded on other grounds, 382 U.S. 198; *Stacy* v. *Wil-*

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[19] Bell is favorably commented on in 77 Har. L. Rev. 1135 (1964).

[20] 345 F.2d at p. 321.

[21] 321 F.2d at p. 500.

liams (D.C. Miss. 3-Judge Court, 1970) 50 FRD 52, 55, aff. 446 F.2d 1366; *Haining* v. *Roberts* (D.C. Miss. 3-Judge Court, 1970) 320 F. Supp. 1054, 1063; *Wright* v. *County School Board of Greensville County, Va.* (D.C. Va. 1966) 252 F. Supp. 378, 385, remanded on other grounds 442 F.2d 570; *Brown* v. *County School Board of Frederick County, Va.* (D.C. Va. 1964) 234 F. Supp. 808, 811, remanded on other grounds, 346 F.2d 22; *Betts* v. *County School Board of Halifax County, Virginia* (D.C. Va. 1967) 269 F. Supp. 593, 604, and *Franklin* v. *County School Board of Giles County* (D.C. Va. 1965) 242 F. Supp. 371, 377-8, rev. on other grounds, 360 F.2d 325, the Court, applying *Bell* and *Bradley*, found that the action of the school boards did not amount to "unreasonable, obdurate obstinacy" or persistent "defiance of law" and denied attorney's fees.[22]

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[22] These cases were summarized in *Haining* v. *Roberts*, *supra*, at p. 1063, thus:

> "In the exercise of this equitable discretion (to allow attorney's fees) in civil rights cases, courts have generally denied the extraordinary relief of awarding attorney's fees absent a finding of 'unreasonable, obdurate obstinacy' on the part of the defendant."

It has been suggested that in certain civil rights cases, counsel really act as "private attorneys general" and, though there is no statutory provision for an award of counsel fees, such award is within the discretion of the Court. This was the basis of the decision in *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1971) 444 F.2d 143, 147-8, where an award of counsel fees was authorized in a suit under Section 1982, 42 U.S.C. The reason for such ruling was that the right asserted by the complainant, though involving public policy, "under present judicial development, *depends entirely on private* enforcement." (Italics added.) A similar conclusion was reached in *Miller* v. *Amusement Enterprises, Inc.* (5th Cir. 1970) 426 F.2d 534, 537-8, where, in justifying an award in a Title II action of counsel fees to "private Attorneys General," the Court said that the "effectuation of this policy (of the Act) was primarily to be achieved through private suits by individuals. This flowed to a large extent from one of the great compromises in this and related legislation. The role of the Attorney General as the chief legal officer was markedly curtailed.

On the other hand, again applying the rule enunciated in *Bell* and *Bradley*, the following decisions found either a "long continued pattern of evasion and obstruction" as found in *Bell* or "unreasonable, obdurate obstinacy" as found in *Bradley*, and, based on such finding, made an award of attorney's fees: *Nesbit* v. *Statesville City Board of Education* (4th Cir. 1969) 418 F.2d 1040, 1043; *Brown* v. *County School Board of Frederick County, Virginia* (4th Cir. 1964) 327 F.2d 655 (remanded for consideration of allowance of attorney's fees in light of *Bradley* and *Bell*); *Griffin* v. *Board of Supervisors of Prince Edward County* (4th Cir. 1964) 339 F.2d 486, 493, reversed on other grounds, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed 2d 256 (where action was "taken to evade and defeat" the mandate of the Court); *Clark* v. *Board of Education of Little Rock School District* (8th Cir. 1966) 369 F.2d 661, 670-1 and

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True, he may bring suit, but only under the limiting circumstances of a 'pattern of practice' of discrimination. And the right of intervention, which is ordinarily accorded under liberalized circumstances, is confined to cases which the Attorney General certifies as being of 'general public importance'—the same added factor which can trigger a three-judge court suit." It is doubtful that the same reasoning would apply to school desegregation actions. To achieve school desegregation, the Attorney General, in any "meritorious" case, upon receipt of a written complaint, is authorized to sue on behalf of any person unable, in his opinion, "to bear the expense of the litigation." Section 2000c-6(b), 42 U.S.C. In addition, the Department of Health, Education and Welfare has a responsibility to see that every school receiving any federal assistance (and, for practical purposes, it may be assumed all do) is desegregated. Section 2000-d, 42 U.S.C. These several provisions of the Civil Rights Act of 1964 mean, as one commentator has phrased it, that, "Every federal agency is instructed to act to implement this pronouncement" against school discrimination and HEW specifically is directed "to assume responsibility for seeing that every school in the United States was (is) desegregated." Note, *The Courts, HEW, and Southern School Desegregation*, 77 Yale L. J. 321, at p. 322 (1967). But, cf., *Bradley* v. *School Board of City of Richmond, Virginia* (D.C. Va. 1971) 53 FRD 28, 41.

449 F.2d 493, 499 (where the Court found in earlier case "obstinate, adamant, and open resistance to the law" on the part of the school board); *Hill* v. *Franklin County Board of Education* (6th Cir. 1968) 390 F.2d 583, 585; *Monroe* v. *Board of Com., City of Jackson* (D.C. Tenn. 1965) 244 F. Supp. 353, 365-6, rev. on other grounds, 380 F.2d 955, and 391 U.S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733; *Rolfe* v. *County Board of Education of Lincoln Co., Tenn.* (D.C. Tenn. 1966) 282 F. Supp. 192, 201, aff. 391 F.2d 77, 81; *Cato* v. *Parham* (D.C. Ark. 1968) 293 F. Supp. 1375, 1378, aff. 403 F.2d 12, further proceedings, 302 F. Supp. 129, 136 and 316 F. Supp. 678, 685; *Kelly* v. *Altheimer, Arkansas Public School Dist. No. 22* (D.C. Ark. 1969) 297 F. Supp. 753, 758-9, rev. and remanded on other grounds 378 F.2d 483; *Pettaway* v. *County School Board of Surry County, Va.* (D.C. Va. 1964) 230 F. Supp. 480, 487 (citing and following *Bell*), remanded on other grounds 339 F.2d 486.[23] It would seem clear, then, that the award of attorney's fees in school desegregation cases is normally governed by the rules enunciated in *Bell* and *Bradley* and only if the facts in the case accord with the test enunciated in those cases is an award generally permissible.

The District Court in this case made a specific finding that there had been "a good faith effort at desegregation on the part of responsible school officials and local government" and, applying the rule stated in *Bradley*, denied relief. We find no "compelling circumstances" for disturbing this finding of good faith. The mere fact that the school district's plans, as developed in hearings before the District Court,

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[23] Cf., *Dyer* v. *Love* (D.C. Miss. 1969) 307 F. Supp. 974, 987, which relied on *Bell* and *Bradley* to support award of attorney's fees in an apportionment case where the conduct of the defendants had been found to represent "unreasonable, obdurate obstinacy."

may have been invalidated by subsequent clarifying decisions of the Supreme Court is insufficient to establish bad faith on the part of the school board. Cf., *Local No. 149, I. U., U. A., A. & A. I. W.* v. *American Brake Shoe Co., supra,* at p. 216; *Rogers* v. *Paul* (8th Cir. 1965) 345 F.2d 117, 125-6. This Court itself did not anticipate the subsequent rulings of the Supreme Court in this area of school desegregation on a number of occasions.[24] We cannot fault the school board because it did not demonstrate greater powers of clairvoyance than either the District Court or this Court in anticipating the extrapolations of *Brown* by the Supreme Court. This conclusion disposes of the plaintiffs' claim for the allowance of attorney's fees based on any claim under *Bradley*.

There is, however, a unique feature of this case, involving at least a quasi-application of the "common fund" doctrine. It relates to the special relief granted by this decision and denied by the District Court. The plaintiffs have by this appeal secured for the students of this school system an additional right, a right of direct *pecuniary* benefit for all students assigned to schools without their neighborhood, a right not given them under the plan approved by the District Court. It is true the right is not represented by a "common fund" and has not resulted in a monetary recovery, against which attorney's fees may be charged but, so far as the students affected are concerned, "the effect * * * is the same as though a fund were created." 6 Moore's *Federal Practice, supra; Sprague* v. *Ticonic Bank, supra.* The students have secured a right worth approximately $60 per year to each of them. This *pecuniary* benefit to the students

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[24] See *Green* v. *County School Board* (1968) 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, and *Swann* v. *Board of Education* (1971) 402 U.S. 1, and 43, 91 S. Ct. 1267 and 1284, 28 L. Ed. (2d) 554 and 586.

involved would under normal circumstances, warrant the imposition of a charge against them for their proportionate share of a reasonable attorney's fee incurred in securing such *pecuniary* benefit for them. It is not practical, however, to do this in this case and, too, to do so would defeat the basic purpose of the relief provided by the amendment in the decree, which was to secure for the student concerned transportation *without cost or deduction*. The only feasible solution in this peculiar situation would seem to lie in requiring the school district itself to supplement its provision of free transportation with payment of an appropriate attorney's fee to plaintiffs' attorneys for securing the addition of such a provision to the plan of desegregation. There are thus "dominating reasons" under the "exceptional circumstances" of this case to award attorney's fees for the services of plaintiffs' attorneys in securing for these students this *pecuniary* benefit. Cf., *Sprague* v. *Ticonic Bank*, *supra*.

In keeping with the foregoing conclusions, this cause is remanded to the District Court with direction (1) to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by the operation of a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes, and (2) to award reasonable attorney's fees to plaintiffs' attorneys as a part of the taxable costs herein for their services in securing an amendment in the plan of desegregation to provide for such free transportation.

Remanded With Directions.

Winter, Circuit Judge, concurring specially:

I concur in the majority's opinion except in regard to what is said with respect to the allowance of counsel fees. I would direct the allowance of counsel fees—and hence I also concur in this part of the judgment—but I would do so on a basis different from that expressed by the majority.

For a circuit which has been the leader in the allowance of counsel fees in school desegregation cases, Bell v. School Board of Powhatan County, Virginia, 321 F.2d 494 (4 Cir. 1963); Brown v. County School Board of Frederick County, Virginia, 327 F.2d 655 (4 Cir. 1964); Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486 (4 Cir. 1964), reversed on other grounds, 377 U.S. 218 (1964); Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4 Cir. 1969), I think that the court takes a false turn when it rests the allowance in this case on a quasi-application of the "common fund" doctrine. Sprague v. Ticonic Bank, 307 U.S. 166 (1939), in which this doctrine was announced, gives little support to the majority's result. There, there was a fund, and the fund was *more* than sufficient to pay all claims. The allowance was prayed to be paid out of the fund. Presumably, therefore, recovery on the claim would not be diminished by the allowance. 307 U.S. at 163. The only question was whether an allowance from the fund was proper when there was not a true class suit. It was held that since plaintiff's recovery was res judicata of the claims of other potential plaintiffs similarly situated, the allowance could properly be made. Here, as the majority recognizes, there is no fund and it is necessary for the majority in effect to create one so that plaintiffs' lawyers can be compensated.

Conceptually, I see grave difficulties with correlating the award of counsel fees to pecuniary benefits to plaintiffs. The

objective in a school desegregation case is the vindication of human rights and human rights are rarely translatable into dollar values. Of course, in this case it can be said that plaintiffs will be granted something having a measurable, pecuniary benefit, but in other cases where the right vindicated is not just lack of transportation, which carries a price tag, I can visualize substantial problems in determining whether the vindicated right has an ascertainable monetary value. And even in this case I am left in doubt of the extent to which, if any, the aggregate pecuniary benefit to all of the plaintiffs is to be considered in determining the amount of the allowance to their attorneys. Ordinarily, aggregate monetary recovery is a substantial factor in fixing a fee for legal services. And if difficult here, assuming that total recovery is an element to be considered, what difficulties will arise in future cases where such a convenient measure of the pecuniary benefit is not at hand?

Where the court goes wrong is in its failure forthrightly to recognize that the decisions in the area of school desegregation subsequent to Brown v. Board of Education, 347 U.S. 483 (1954) (*Brown I*), all hold that *Brown I* means just what it says and that beginning in 1964 the Supreme Court has said repeatedly that further delay in its full implementation will not be tolerated. Griffin v. School Board, supra; Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969). I find quite unpersuasive the implied assertion that *Brown I* required, or was afforded, subsequent clarification, or that clairvoyance was required to foresee the result in Green v. County School Board, supra, and Swann v. Board of Education, 402 U.S. 1 (1971). The only change in the course of

direction of *Brown I* that I have been able to perceive is abandonment of the mandate of "all deliberate speed," as announced in Brown v. Board of Education, 349 U.S. 294, 301 (1955) (*Brown II*), and the substitution of "at once" and "now," as announced in *Griffin, Green, Holmes* and *Carter*. This change of direction in the immediacy of the application of *Brown I* does not dilute, modify or alter its substance, but I think it requires an extension of the rule we initially announced in *Bell*.

In Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), it was held, in a suit brought under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination at five drive-in restaurants and a sandwich shop, that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. 402. The rationale of the holding was "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."

Of course, in *Newman* there was a statute authorizing an award of counsel fees in a suit brought under *Title II* of the Act, and, strictly read, *Newman* simply decided how the statute should be applied. But the lesson to be learned from *Newman* is directly applicable here. We have the authority to award counsel fees in this equitable action; no statute is required. True, up to now, we have awarded them only "when it is found that the bringing of the action [to desegregate effectively] should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." Bradley v. School Board of City of Richmond, Virginia, 345 F.2d 310, 321 (4 Cir. 1965). Such an applica-

tion was proper in the context of "all deliberate speed" because; there, there was room for legitimate debate as to the period of time within which the conflicting demands of aggrieved plaintiffs and the community interest in a smooth, uneventful transition to a unitary system of public education were to be accommodated. But *Griffin, Green, Alexander* and *Carter* have created a different context. By now the transition should have been accomplished. If it has not, the burden of persuasion to explain the delay should rest on those who have the power to accomplish the objective but who have failed to achieve it, and not on those whose rights continue to be violated. It seems to me, therefore, to be appropriate now to hold, in the light of those cases, that reasonable and adequate counsel fees should be awarded as of course unless special circumstances would render an award unjust.

There is every reason to arrive at this result. Despite the extensive enforcement responsibilities the statutes place on the Departments of Justice and Health, Education and Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. The Department of Justice has not appeared in this stage of this very case. Indeed, it has appeared at only one stage of the tortuous history of the desegregation of the Norfolk schools. Brewer v. School Board of City of Norfolk, Virginia, 434 F.2d 408 (4 Cir. 1970). Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation. The time is *now* when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them, even in the absence of any showing of "unreasonable, obdurate obstinacy."

If we were to adopt the rule I champion, I could not find in the light of *Swann* and Davis v. School Comm'rs. of Mobile County, 402 U.S. 33 (1971), that there are any special circumstances rendering an award of counsel fees unjust. Hence, I join in directing that counsel fees be awarded.

JUDGMENT

Entered March 7, 1972

United States Court of Appeals
for the
Fourth Circuit

No. 71-1900

Carlotta Mozelle Brewer and Demetria Yvonne Brewer, infants by Oner Brewer, their father and next friend, et al., Appellants,

vs.

The School Board of the City of Norfolk, Virginia, et al., Appellees.

Appeal from *the United States District Court for the* Eastern *District of* Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Eastern *District of* Virginia, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, and this cause, be, and the same is hereby,* remanded to the United States District Court for the Eastern District of Virginia, at Norfolk with directions (1) to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by the operation of a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes, and (2) to award reasonable attorney's fees to

plaintiffs' attorneys as a part of the taxable costs herein for their services in securing an amendment in the plan of desegregation to provide for such free transportation.

Samuel W. Phillips
Clerk

JUDGMENT

Entered March 7, 1972

United States Court of Appeals

for the

Fourth Circuit

No. 71-1901

Carlotta Mozelle Brewer and Demetria Yvonne Brewer, infants by Oner Brewer, their father and next friend, et al.,

Appellees,

vs.

David E. Allgood, infant, etc., et al.,

Appellants.

Appeal from *the United States District Court for the* Eastern *District* of Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Eastern *District of* Virginia, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* remanded to the United States District Court for the Eastern District of Virginia, at Norfolk with directions (1) to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by the operation of a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes,

and (2) to award reasonable attorney's fees to plaintiffs' attorneys as a part of the taxable costs herein, for their services in securing an amendment in the plan of desegregation to provide for such free transportation.

Samuel W. Phillips
Clerk

Nos. 71-1900 and 71-1901

ORDER

Entered April 3, 1972

After due consideration of the motion for stay of mandate herein and after consultation with all members of the Court,

It Is Hereby Ordered, That the mandate of this Court in the above case be stayed until April 18, 1972, in order to permit the defendants to apply to the Supreme Court for a writ of certiorari, or to apply to that Court for a stay.

MEMORANDUM OPINION

Entered July 28, 1971

Encouraged by the patent spirit of cooperation manifested in the recent hearings in this case, we are happily optimistic that Beckett, et al. v. The School Board of the City of Norfolk, et al., filed in May, 1956 may be progressing to a belated but final conclusion.

Under the mandate of *Swann* v. *Charlotte-Mecklenberg Co. Board of Education*, ... U.S. ..... (April 20, 1971), and the directions issued on remand of that case from the United States Court of Appeals for the Fourth Circuit, on June 6, 1971, the School Board of the City of Norfolk has

proposed its plan for the operation of its schools for the year 1971-1972, a plan which uses single school attendance areas, pairings and groupings of schools in both contiguous and non-contiguous attendance zones and extensive bus transportation to achieve the greatest possible degree of actual desegregation.

The Plan, to be successful in its operation, will require the maximum collective efforts of the School Board, school administrators, school teachers, parents of both races, the affected children and the public at large. To augment those efforts, this court here demonstrates its confidence and support of the proposed Plan and urges cooperation of the citizens of Norfolk.

The Plan as submitted and amended by the Norfolk School Board, attached hereto as Appendix "A," is approved.

In general profile, the Plan will require that many thousands of students will be involved in mass busing. Often the trips will be long and tedious for children of tender age. Parents of both races have expressed their opposition, but, always in good grace and to date, always within the posture of proper legal proceedings. It is hopeful that the inconvenience, expense and the magnitude of the busing can be appropriately reduced in time, but under the course presently prescribed by appellate courts, the School Board has been wise in its proposal. In my judgment, never has a more dedicated School Board struggled with a more complex problem.

The School Board Plan for Norfolk encompasses 54,000 students in five high schools, ten junior high schools and fifty-four (54) elementary schools, a total of sixty-nine (69) schools.

The plaintiffs originally raised objections to the Plan as to pupil attendance in only two schools, Tucker Elementary and Campostella Heights Elementary. Tucker, under the original plan, remained 100% black and arguably with some valid reasoning. Nevertheless this court was constrained to reject the plan as to this single uniracial school as not meeting the tests recently announced in *Swann* v. *Charlotte-Mecklenburg County Board of Education*, ... U.S. ..... (April 20, 1971). As a result, complying with the order of this court dated July 19, 1971, the School Board submitted an amended plan. Under the amendment Tucker is paired with Norview Elementary. Prior to its pairing with Tucker Elementary, Norview Elementary with 750 students, as a single attendance area school, represented a racial ratio of 63% white, 37% black. Tucker Elementary, with 460 students as stated, was 100% black. Under the amended plan and the pairing of these two schools, Norview Elementary with grades 1-3, will present a racial ratio of 41% white, 59% black. Tucker's racial ratio, in grades 4-6, will be 52% white, 48% black. The uniracial status of Tucker Elementary is thus removed.

Campostella Elementary, with an enrollment of 175 carries a racial ratio of 70% black and 30% white. There is, therefore, a departure from the plan of 60% white, 40% black, the city-wide racial ratio the School Board has conscientiously tried to apply but which cannot always be adhered to. Dr. Stolee, plaintiffs' expert witness, whose "Plan C" has previously been viewed with favor by the Fourth Circuit, had previously advocated leaving this school untouched under that "Plan C." The evidence shows that the area surrounding Campostella Elementary is integrated in fact and is stable in terms of acceptance by those in the the neighborhood itself. Statistics reveal that the Negro majority in the school has decreased about 5% in the last

20 months. No change in attitude or result, other than continued quiet integration of the neighborhood, is foreseen. To attempt to pair this school and reduce its black-white ratio would at the same time change the delicately balanced and acceptable ratio in one or more other schools, and at great disruptive cost. In leaving the racial composition of Campostella and its 70% black, 30% white enrollment as it is, the court is convinced that such composition is not representative of discrimination and is balancing itself in a stabilized community. The United States had no objection to the Campostella Heights plan of the Board.

This court is of the opinion that the School Board in its amended plan for racial distribution of student enrollment has made every effort to achieve the greatest possible degree of actual desegregation under the tests of *Swann, supra*. The objections of the plaintiffs are Denied. The objections, on other grounds, of both sets of intervenors, are likewise Denied.

The plaintiffs' exception to the Norfolk Plan for its failure to provide for a reporting procedure is premature. All of the evidence, which plaintiffs cannot counter, is that regular reports are now, and have been promptly made by the School Board as soon after the opening of schools as the appurtenant statistics are available.

There has been no showing of any failure to report or of any failure to provide information requested.

The general rule is that there is no duty to provide free transportation of children to a public school system absent a statute which requires this activity. 79 C.J.S., *Schools and School Districts*, § 475(2).

Virginia, by statute, leaves transportation of school children, in its cities, to the discretion of the City School Boards:

> "City School Boards may provide for the transportation of pupils; but nothing herein contained shall be construed as requiring such transportation. . . ." Va. Code Ann. § 22-97.1.

No attack is here mounted against this statute. No discrimination in its origin or effect is here evident. It applies to all cities and their populations without regard to race and is in accord with generally accepted legal principles.

Quite properly, the matter should be left with the School Board and the City of Norfolk. Funding of such a project would be most difficult. In this case, the credible evidence places the initial cost at more than $3,600,000.00. For the School Board to request and the City to raise such a sum would be primarily a matter of an increase in taxes or a bond issue, peculiarly a City problem to be considered in the light of all of its other financial affairs. In short, free school transportation is a legislative prerogative and not the proper subject of judicial fiat on the strength of the facts of this case. The suggestion by plaintiffs made in argument that the white flight which might flow from the execution of the proposed Norfolk Plan may so materially reduce the number of teachers as to thus make funds for pupil transportation available to the School Board within its present budget is in reality a better ground to refuse the Plan than to provide free transportation.

The only Cities in Virginia which have exercised their discretion in favor of free school transportation (and usually only in a segment of such city, newly annexed) have done so under the impact of annexation decrees or merger

agreements in which sizeable portions of rural, former county areas, theretofore serviced by school buses, have been joined to cities. Such is the case in Chesapeake, created by the merger of Norfolk County and the City of South Norfolk; Virginia Beach as the result of its merger with Princess Anne County; the Henrico County, Chesterfield County and the City of Richmond annexation decree.

Swann, supra, is not authoritative in this field. No specific language therein directs free transportation in the busing which it says is to be employed as a tool of desegregation. On page 26 of the slip opinion in *Swann,* a footnote carefully points out that North Carolina, by statute, requires the busing of students who live more than 1½ miles from the school they attend. N.C. Gen. Statute 115-186(b). In Virginia the law as to cities is to the contrary.

Manifestly, enforced busing does work a hardship on indigent students. The Chairman of the Norfolk School Board indicated every effort was being made to find a solution to offer free transportation in this limited field, but like school lunches and free text books, the ultimate decision in such economic matters is for the School Board of the City, not the courts.

Amidst the efforts towards legal and mechanical compliance with judicial desegregation edicts, the "rising senior option" provision of the Norfolk Plan is the only bright spark of humanism. A student completing his junior year has the option to remain in the same school to complete his senior year. The provision applies alike to black and white and could be hardly less discriminatory. The plaintiffs in argument, freely admit that it is a rule of great benefit to students of both races. As a matter of fact,

the only objection raised by the plaintiffs is over the *possibility* of a swing of less than 10 percentage points in the black-white ratio in one high school, Booker T. Washington.

When one compares this picayune exception with the mammoth good the senior option offers, this court unequivocally approves the provision. In the first place, seniors represent the leadership in high schools. It is this group that encompasses most of the elective officers positions of prominence in school organizations, choral groups, bands, marching corps, and officers in reserve groups. Of great importance, also, the outstanding members of athletic teams, are usually seniors. Having progressed to these positions of prominence, academic, extra-curricular and athletic, the importance of giving these students, black or white, their great day in the sun becomes obvious. For many, it will be their last days of education and a chance to develop the leadership and responsibility which maturing years have thrust their way and which they have evidenced their acceptance. For many others, it will be the sole opportunity to secure scholarships by academic excellence and through athletic prowess in an atmosphere to which they have grown accustomed and which would most successfully foster their talents. For many it is a continuation, to an apex, of a relationship with dedicated guidance counsellors who have been mapping student careers towards college attendance, or employment after graduation. This is a program in which carefully nurtured mutual understanding and confidence would be totally destroyed were the counselling relationship to be broken and the student summarily directed to another school. And of great importance, as pointed out by Norfolk's enlightened Chairman of the School Board, in previous hours of strain in the fields of

school discipline and other social problems, student leadership and assistance administered by those mature seniors who have acquired status and to whom their juniors look for guidance on a day-to-day basis has been a significant aid.

To disturb all of this over the possibility of a swing of a few ratio percentage points in one school in sixty-nine is a course this court would not choose to follow.

A majority-minority transfer provision, with attendant transportation costs borne by the School Board, recognized as a necessary adjunct to desegregation in *Swann, supra,* will be retained in the Norfolk Plan. If it is not now literally written therein, it will be so considered by virtue of this Opinion and subsequent Order. Only forty-eight (48) students availed themselves thereunder in 1970-1971.

A specific provision in the Plan to call for a minimum number of black administrators and teachers in the system is not necessary, as no problem in that field has been presented or suggested. The evidence before the court is that the number of black teachers and black supervisors has been increasing year by year in the Norfolk system. Efforts in this direction by the Norfolk School Board are not criticized by any of the parties to this suit. The minimum levels, and a provision therefor, are here suggested only as safeguards. There being no necessity shown for such provision, this court chooses not to move in an area where no relief is required.

Finally, on the point of plaintiffs' attorneys fees, the Fourth, Sixth and Eighth Circuits have enunciated their views, all three following the same line of reasoning.

The Fourth Circuit in *Bradley* v. *School Board of City of Richmond*, 345 F.2d 310 (4th Cir. 1965), established four basic criteria relating to the problem: (1) only in the extraordinary desegregation case, one of purposeful opposition to desegregation by school officials, should an award be granted, (2) the fact that substantial relief is granted petitioners is not in itself justification for an award, (3) an award should be granted only when the bringing of the litigation should have been unnecessary but for the opposition by the school officials and finally, (4) the District Judge is granted wide discretion in deciding whether conduct of school officials has been so unreasonable as to justify an award.

The Eighth Circuit, citing *Bradley*, in *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965), upheld a denial of attorney's fees to those challenging a school board desegregation plan. The court stressed the wide discretion accorded the court in deciding the question and endorsed the proposition that only cases of extraordinary opposition to desegregation by school officials would justify awards of fees.

Fees were awarded in a Fourth Circuit case, *Bell* v. *School Bd. Powhatan County, Va.*, 321 F.2d 494 (4th Cir. 1963). The facts indicate an extreme case in which no steps had been taken to desegregate, and there was evidence of concerted efforts by school officials to impede attempts of blacks to transfer to the white school. Even there, however, two judges of the Fourth Circuit felt the District Judge's denial of fees was within his broad discretion. *Bradley*, *supra*. Another Fourth Circuit case, *Griffin* v. *County School Bd. Prince Edw.*, 363 F.2d 206 (4th Cir. 1966) allowed an award of fees. Here again the circumstances were extreme. The County Board of Supervisors, having disbursed public school funds to maintain private segregated

schools, were held in contempt of court for their extreme opposition to desegregation efforts.

In *Rolfe* v. *County Board Ed., Lincoln County, Tenn.*, 391 F.2d 77 (6th Cir. 1968) an award of attorney's fees was ordered where the court found that there had been a long, continuing obstruction of desegregation by the defendant school officials and government.

Only in cases of obvious failure by the school officials to make good faith efforts to desegregate, or where prolonged and concerted efforts to impede desegregation are evidenced, is an award of attorney's fees justified. We make a factual determination in this case that there has been, in fact, a good faith effort at desegregation on the part of responsible school officials and local government.

In light of the present Norfolk School Plan of the preceding litigation herein and the totality of the circumstances of this case, attorney's fees for plaintiffs' counsel as an item chargeable to the School Board, is Denied.

An order in keeping with the tenor of this Memorandum Opinion is entered this day.

John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 28, 1971